

REMARKS

In the Office Action dated February 10, 2004, claims 1, 4-8, 15, 25 and 27 were rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent 5,720,276 to Kobatake et al. Claims 9-10, 12, 14, 16, 24, 26 and 28 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Kobatake et al. in view of U.S. Patent 6,123,074 to Hete et al. Claims 17, 19 and 21 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Kobatake et al. in view of U.S. Patent 6,237,594 to Davenport. Claims 8, 20 and 22 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Kobatake et al. in view of Hete et al., further in view of Davenport.

In the Amendment under 37 C.F.R. § 1.116 filed May 10, 2004, claims 1 and 9 were amended to incorporate therein the recitation of claims 29 and 31, to recite that the breath detection port is provided separately from the oxygen outlet.

Applicants traversed the rejection of claims 29 and 30 as being unpatentable over Kobatake et al. in view of U.S. Patent 6,394,088 to Frye et al, and further traversed the rejection of claims 31 and 32 as being unpatentable over Kobatake et al. in view of Hete et al., further in view of Frye et al. Particularly, the Examiner considered that it would have been obvious to employ a breath detection port separate from the oxygen outlet, as taught by Frye et al., in the apparatus of Kobatake et al., in order to control the amount of oxygen a patient receives during inhalation and exhalation. However, as pointed out by Applicants, the proposed modification would considerably complicate the in-line structure shown in Fig. 3 of Kobatake et al., and would require one of ordinary skill to substitute the complex nasal delivery structure 32 of Frye et al. for the nasal cannula 36 of Kobatake et al., “of a well known type and [is] available on the

market". Particularly, Applicants requested the Examiner to reconsider for the reason that one of ordinary skill would not be lead to apply the nasal delivery structure 32 of Frye et al. including a breath detection port provided separately from the oxygen outlet to the apparatus of Kobatake et al.

In the Advisory Action dated June 29, 2004, the Examiner indicated that the amendment did not put the case in condition for allowance. In this regard, the Examiner reasoned that although the oxygen delivery system of Frye et al. requires a complex nasal delivery structure, such is irrelevant to the merits of the claimed invention. The Examiner continued with a discussion of the criteria that are applied to determine whether or not a reference is non-analogous prior art. However, Applicants' remarks as set forth at page 10 of the Amendment under 37 C.F.R. § 1.116 filed May 10, 2004 never brings up the issue of non-analogous art. Rather, Applicants base patentability on lack of motivation to one of ordinary skill to substitute the complex nasal delivery structure 32 of Frye et al. for the nasal cannula 36 of Kobatake et al.

The Amendment under 37 C.F.R. § 1.116 filed May 10, 2004 was entered with the filing of the RCE on July 12, 2004.

Now, claim 1 has been further amended to incorporate therein the recitation of claim 4, to recite that the oxygen enriching apparatus further comprises a sensor for detecting the user's state of breathing disposed on a flow passage reaching the breath detection port, to further define over the applied prior art. Claim 4 has been canceled. Claims 5 and 6 have been amended to depend from claim 1.

AMENDMENT UNDER 37 C.F.R. § 1.111
U.S. Application No. 09/956,925

Q66253

Withdrawal of all rejections and allowance of claims 1, 5-10, 12, 14-22, 24-30 and 32 is earnestly solicited.

In the event that the Examiner believes that it may be helpful to advance the prosecution of this application, the Examiner is invited to contact the undersigned at the local Washington, D.C. telephone number indicated below.

The USPTO is directed and authorized to charge all required fees, except for the Issue Fee and the Publication Fee, to Deposit Account No. 19-4880. Please also credit any overpayments to said Deposit Account.

Respectfully submitted,



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